Filed 4/8/10 P. v. Hernandez CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PEDRO CRUZ HERNANDEZ, Defendant and Appellant.	H033701 (Monterey County Super. Ct. No. SS050631)

On October 19, 2005, the Monterey County District Attorney filed an amended information charging appellant Pedro Hernandez with two counts of lewd conduct on a child under the age of 14 years (Pen. Code, § 288, subd. (a), counts one and two); and one count of dissuading a witness. (Pen. Code, § 136.1, subd. (c)(1), count three.)

Following a court trial, on April 19, 2005, guilty verdicts were returned on counts one and two and the prosecution moved the court to dismiss count three. On December 13, 2005, the court sentenced appellant to an aggregate prison term of 10 years consisting of the upper term of eight years on count one and a consecutive subordinate term of two years (one third the mid-term) on count two.

Before the court imposed sentence, the court asked appellant if he wished to address the court. Appellant stated, "Even if I were tortured today to get me to plead, I would still continue to plead innocent. I think my attorney and the district attorney

worked together to find me guilty. . . . [¶] Your Honor, the proper investigation necessary were [*sic*] never carried out nor was a psychologist sent to see me in order to do an evaluation and no one even wanted to examine the supposed victim, never did a specialist interview her. . . . [¶] . . . I was found guilty without having an attorney who would defend my rights."

Defense counsel said, "Before the Court imposes sentence, this is the first I heard of this. It strikes me that what he has indicated in that letter is the basis for what we would call a *Marsden* motion, motion to remov[e] counsel, and also he's raising issues that he feels is incompetence of counsel. [¶] And the appropriate . . . procedure at this point, I would ask that the Court would continue the sentencing and perhaps either appoint counsel to have him go over some of those issues. [¶] If I would have known -- obviously, it's not a *Marsden* that's being conducted in chambers or here in open court, but it does appear, at this point, I'm not sure that it's even appropriate for me to continue representing him. He certainly has raised issues and perhaps that's something that should be looked at by independent counsel before the Court imposes sentence and I would ask the Court to do that." The court responded, "That request is denied."

Appellant appealed his conviction in case number H029725, raising claims that the trial court's prejudicial denial of his motion to substitute counsel and to accede to defense counsel's declaration of a conflict at the critical new trial motion stage violated his right to effective, conflict-free assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

This court remanded the case to the superior court for further proceedings on appellant's allegations concerning his counsel's performance. This court directed that if the superior court found that appellant had presented a colorable claim of ineffective assistance of counsel, the court was to appoint new counsel to fully investigate and if appropriate present a motion for a new trial based on ineffective assistance of counsel.

Alternatively, if the court did not find a colorable claim of ineffective assistance of counsel, the court should proceed to resentence appellant.

On remand, on October 17, 2008, the superior court denied appellant's *Marsden* motion.[1] On December 16, 2008, appellant was resentenced to eight years in state prison consisting of the mid-term of six years on count one and a consecutive subordinate term of two years on count two.

Appellant filed a timely notice of appeal on December 22, 2008.

On appeal, appellant contends that the trial court's failure to find a colorable claim of ineffective assistance of counsel based on counsel's failure to hire a *Stoll* expert was a prejudicial abuse of discretion that violated his Sixth Amendment rights.[2]

Subsequently, in a petition for writ of habeas corpus, which this court ordered considered with the appeal, Hernandez contends that he was denied the effective assistance of counsel because his trial counsel 1) failed to hire a forensic psychologist to examine him before trial; 2) failed to impeach the victim with a taped examination; 3) failed to call a witness Miriam to the stand to impeach the victim; and finally, newly discovered evidence contradicts prosecution witnesses, which merits a new trial. By separate order filed this day, we deny the petition for writ of habeas corpus. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

Furthermore, for reasons that follow, we affirm the judgment.

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1 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

2 An exception to Evidence Code section 1101 allows a criminal defendant to introduce evidence, either by opinion or reputation, of his character or a trait of his character that is relevant to the charge made against him. (Evid. Code, § 1102.) Such evidence is relevant if it is inconsistent with the offense charged and hence may support an inference that the defendant is unlikely to have committed the offense. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1305.) Thus, in *People v. Stoll* (1989) 49 Cal.3d 1136, 1152-1161, the California Supreme Court held that a defendant charged with child molesting may introduce such character evidence by means of opinion testimony of an expert witness. In order for the expert to form this opinion, the defendant must submit to psychological testing. (See *People v. Stoll*, *supra*, at p. 1154.)

Factual Background[3]

The evidence adduced at trial showed that in the summer of 2004 appellant and his brother Miguel shared a room in a garage behind the house in which six-year old Jane Doe lived. Family members became concerned about certain behaviors that Jane Doe was exhibiting. Jane Doe testified at trial appellant and Miguel invited her into the garage, laid her on the bed without her clothes, and took off her clothes. When Miguel took a shower, appellant touched her private parts. He touched her with his hands and touched her private part with his tongue. Jane Doe testified that appellant had tattoos, including one of a star near his penis.

Other witnesses testified that appellant had no problems with any of the children living in the house. Appellant testified and denied inviting Jane Doe into the garage or having any inappropriate contact with her. The parties stipulated that appellant had no tattoos.

The trial court convicted appellant of two of the lewd act counts and granted the prosecutor's motion to dismiss count three. At sentencing, defense counsel noted that appellant maintained his innocence of the charges and observed that the trial court had said that this was a "close case." Defense counsel argued that appellant was a hard-working person and submitted many letters attesting to the "high esteem" in which appellant was held by his employer and many others, some of whom were parents.

The court went on to sentence appellant. Thereafter, as noted, appellant appealed his conviction.

Remand Hearings

In the initial remand hearing held on September 5, 2008, the court asked trial counsel, Susan Schwartz, to make "an effort to recreate the moment just before

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[3] We take most of the background facts from this court's unpublished opinion in *People v. Hernandez* H029725.

sentencing." Schwartz continued to act as appellant's counsel throughout the remand hearings.[4]

After reading a letter that appellant had written earlier, the court asked appellant "what is your complaint about how -- that deals with your relationship with your attorney?" Appellant replied, "I asked for a psychological evaluation on myself, and she did not allow it." In addition, appellant believed that a witness who was not called to testify should have been called and that Jane Doe should have submitted to a medical examination.

Regarding her failure to have a so called *Stoll* examination conducted on appellant, defense counsel admitted that it was true. Then, the court asked trial counsel to address the specific allegation that Hernandez asked her "to have him evaluated psychologically and [she] refused." Trial counsel responded, "I don't have a specific recollection. These events happened -- the trial was three years ago. It started before. [¶] It was a difficult time for me between April and October. My mother was quite ill. And she died almost three years ago today. She died at the end of August. That was very painful. I was with her for that time period for about 10 days. I was literally with her for 24 hours. I returned very quickly and went back to the trial. [¶] I know that some of the time the case was continued and that Mr. Hernandez did not see me because I was gone because of that. [¶] In terms of a specific recollection of each of these things he's saying today, that he made this request to me, I don't have a specific recollection. . . . [¶] I don't -- I can't tell you that he made that request and that he made those requests and they were denied. I cannot tell you he did not make those requests. I don't have a recollection as to those things. [¶] I have to say --"

The court asked trial counsel, "You would talk to him about something like that, wouldn't you? You're looking like maybe that wouldn't happen." Trial counsel replied,

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[4] Habeas counsel was present in the courtroom during the remand hearings.

"Well, I, you know, I should. I mean every time we talk to a client, I should write something down and do those notes from every jail conversation, get [it] transcribed and every visit I had with him. I can't --"

At this point, the court asked trial counsel what the purpose of the *Stoll* examination might be. Trial counsel explained her understanding of a *Stoll* examination and admitted that it "might have been an issue as to trial. It also might have been an issue to be presented to the Court in terms of sentencing."[5] The court acknowledged, "It goes straight to the heart of the case, doesn't it, of a case like this?" Both the court and trial counsel agreed that it was "not an ancillary issue." Again, trial counsel stated that she did not know if she had been asked by appellant for a *Stoll* examination. Thereafter, the court directed her to "go back through [her] notes and find out whether or not [she had] any record whatsoever of that request being made."

Trial counsel noted that before trial she "had discussions" with her supervisor Mr. Nolte about "whether or not to do that." Thereafter, she admitted "that was my error, I think, in not going -- we discussed sometimes it's done in cases. I don't remember specific discussion." After the court asserted, "[y]ou made a decision, though. You did contemplate it and evaluated it, and you didn't do it," the court ordered trial counsel to check her notes.

Later, trial counsel admitted, "while I don't honestly remember ever having discussion of a psychologist with my client, I can tell you honestly in retrospect and the way I'm handling some cases now, at least in the juvenile court situation, I feel I may have dropped the ball in not doing that. I could have done it, even done that confidentially."

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[5] Trial counsel explained her understanding to be that a "psychologist would come in to give an opinion whether or not the client appears to be a pedophile."

At the end of the hearing the court directed counsel "to go back through [her] notes as to each of these complaints"; and to talk to her supervisor, Mr. Nolte, who had retired.

At the October 17, 2008 hearing, trial counsel informed the court that she now believed that appellant had never raised the *Stoll* examination issue before trial. Counsel believed that if appellant had raised the issue, she would have remembered it. If appellant had asked for an examination, counsel felt "that would have changed the complexion on the part of [her] decision." As to her discussions with her former supervisor, trial counsel informed the court that Nolte "did not have a specific recollection of the discussions one way or another" despite the fact that "he was very familiar with the case." Trial counsel recalled that Nolte had suggested utilizing a psychologist; that "those were done in the cases" but Nolte did not demand that she do so. Further, after talking with Nolte, she realized that *Stoll* examinations had become so common in child molestation cases that she was worried about the lack of any *Stoll* evidence on the court's opinion in the case. Counsel stated, " 'Oh, my goodness, did the absence of that in some way enter into the Court's decision?' "

Although trial counsel could not remember the reason for failing to have a *Stoll* examination conducted, she did remember she had made a decision not to do it. Subsequently, the court emphasized, "I have two talented attorneys that have considered the issue and the decision which was not vetoed . . . ."

The court asked habeas counsel for his input. Habeas counsel pointed out that trial counsel had failed to provide any tactical reason for any of her disputed decisions. The court questioned habeas counsel, "am [I] supposed to substitute my judgment for Mr. Nolte, or for Ms. Schwartz who have engaged in a career of -- of making these kind of decisions?" Habeas counsel stated that the court had to determine whether trial counsel had made a reasonable tactical decision.

After several exchanges between habeas counsel and the court, trial counsel recalled reasons for her decision. She stated, "I remember having reasons at the time, and near as I can remember of what my reasons were, they had to do with this particular client and the relation in the case. My client's first language was Zapoteco, and we were dealing with Spanish . . . I had some real concern, well, as to how -- how he might relate to that in terms of getting, at best we would get a forensic psychologist or psychiatrist who was fluent in Spanish to go through that. If we got a report that we were going to use in some way to put forward, it was certainly likely that then the prosecution could have him examined; there was a possibility of an examination, and I believe that part of my sense of it was that this would be something that would almost be like a linguistic trap in some way for my client. I believe as best as I can recollect, that was –that was my thought at the time, just because of --of interactions with the client."

The court noted that when appellant testified "he was speaking Spanish in a way that the translator could understand and articulate, because he speaks very well." Trial counsel acknowledged that appellant's ability to speak Spanish improved over time; that he had become "a great Spanish speaker."

The trial court found that the record was sufficient for the court to do the job it needed to do, "which is to determine whether or not, under the circumstances as we can best recreate them, whether or not the Court would have granted a Marsden motion back on that day. And the answer is clearly no, the Court would not have granted the Marsden motion. There wasn't a breakdown in the relationship between the attorneys and the client. There were some disagreements. [¶] Again, if you look at the kind of disagreements that arose during this case, it really did have to do with tactical decisions as a rule, whether or not to pursue this. And, you know, on one hand I -- I made the observation about his ability to speak; on the other hand, there is clearly something that sometimes appears to be lacking in logic, coming from the defendant, which is demonstrated by the request to have the victim examined in order to compare the blood --

the blood on the clothing, when there was no clothing with blood on it. I mean that's -- there was testimony about that --that fact having been reported, but no clothing was seized with blood on it. [¶] And then to raise that as a disagreement with you, where if that disagreement --if that conversation had occurred, where he was complaining that no examination was done of her in order to get the blood in order to compare it to the blood on the clothing, if that conversation had occurred, your response would have been 'There is no clothing with blood on it to compare.' I mean, that's -- that is, I guess what I am getting to. There's some logic missing here. But I -- I see that as the primary foundation of the disagreement, that there are tactical decisions that you made that are -- I'm not going to try to second guess you really on them. On the face of it, it appears to be a sound tactical decision that others might disagree with. I think that's probably a fair statement, but not obviously an inappropriate decision to make. [¶] The same is true of the psychologist, to the extent that that was an issue, the Court is convinced that that is an area perhaps, perhaps --in fact, I would make the finding that that conversation never occurred between the two of you. I do think that is something that you would have remembered. I do think that the conversation that he is saying he requested of you and you refused him, and the reason I guess I'm making that finding is because I do believe that you experienced some surprise back on the day of sentencing when he made a mention of the psychologist, and that's surprising because you had not had a conversation with him about it. And -- and at that time, you know, you wouldn't have been surprised if it had, I guess. So I -- I do make that finding. I find that that's not -- that didn't happen. And I think that could be attributed to the -- to the time lapse between the -- the fact that he has a recollection perhaps of that occurring is certainly accountable due to the time lapse and -- and faded memories. [¶] There really isn't a reason why the Court would have granted a Marsden motion back in the day when this all occurred."

Discussion

Appellant asserts that the trial court's failure to find a colorable claim of ineffective assistance of counsel for the failure to hire a *Stoll* expert was a prejudicial abuse of discretion. Appellant argues that in conducting the hearings and rendering its decision, the trial court never referred to the language of this court's opinion in H029725 that it should determine whether or not there was a "colorable claim" of ineffective assistance of counsel.

"A defendant 'may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired.' [Citations.] The law governing a *Marsden* motion 'is well-settled. "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." [Citations.]' [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 857.)

Thus, a defendant represented by appointed counsel may request discharge of his attorney and substitution of a new attorney if the defendant's right to counsel would be substantially impaired by continuing with the original attorney. (*Marsden, supra,* 2 Cal.3d at p. 123.)

" 'When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to courtroom events that the trial court

observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a "colorable claim" of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. . . .' " (*People v. Smith* (1993) 6 Cal.4th 684, 692-693 (*Smith*).)[6] To establish a colorable claim of inadequacy of counsel, the defendant must credibly establish to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings. (*Id.* at p. 691.)

The *Smith* court confirmed, "substitute counsel should be appointed when, and only when, . . . in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*Smith*, *supra*, 6 Cal.4th at p. 696.) The decision to appoint new counsel lies in the sound discretion of the trial court and "will not be overturned on appeal absent a clear abuse of that discretion." (*Ibid.*)

Smith made clear that, in ruling on a *Marsden* motion, the court considers "what has happened in the past" and determines "whether [appointed defense] counsel has been providing competent representation." (*Smith, supra,* 6 Cal.4th at pp. 694-695.)

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[6] As did trial counsel, this court interpreted appellant's statements made at the sentencing hearing as a request to appoint new counsel to investigate his claim of ineffective representation of trial counsel. That is why we sent the matter back to the trial court to see if there was a colorable claim of inadequacy of counsel.

Here, while the trial court made an express finding that the defendant had not requested a psychologist, which is not necessarily dispositive of counsel's competence under the circumstances of this case, it seems to this court that the lower court was treating the failure to consult a psychologist as a tactical decision based on counsel's wish to not expose the defendant to an examination by the prosecution.

At the time of appellant's trial, the California Supreme Court had not decided *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 (*Verdin*). In *Verdin*, the Supreme Court considered "whether a trial court may order . . . a criminal defendant, to grant access for purposes of a mental examination, not to a court-appointed mental health expert, but to an expert retained by the prosecution." The *Verdin* court concluded that a trial court may not issue such an order. (*Id.* at p. 1100.) The *Verdin* court began its analysis by concluding that such an examination constitutes "discovery," within the meaning of California's statutes governing discovery in criminal cases, namely, section 1054 et seq. (*Id*. p. 1105.) The *Verdin* court acknowledged that courts in several cases, including *People v. Danis* (1973) 31 Cal.App.3d 782 (*Danis*), had held that a trial court may order a defendant who has placed his mental state at issue to undergo a mental examination conducted by an expert retained by the prosecution. (*Verdin*, *supra*, 43 Cal.4th at p. 1106.) However, the *Verdin* court stated that *Danis's* reasoning that trial courts possess the "inherent power to order such discovery" is "insupportable following the 1990 enactment of section 1054, subdivision (e), which insists that rules permitting prosecutorial discovery be authorized by the criminal discovery statutes or some other statute, or mandated by the United States Constitution." (*Id.* at p. 1107.) Thus, the *Verdin* court concluded that *Danis* and its progeny "have not survived the passage of Proposition 115." (*Id.* at pp. 1106-1107.) Furthermore, the *Verdin* court concluded that neither California's criminal discovery statutes, any other statute, nor the United States Constitution authorize a compelled mental examination of a criminal defendant conducted by an expert retained by the prosecution. (*Id.* at p. 1116.)

Thus, at the time defense counsel made the decision not to have a psychological examination conducted on appellant, it would be reasonable for counsel to believe that by exposing her client to examination and proposing to use the examination at trial, she would be exposing her client to examination by a prosecution expert—something that she determined was not in appellant's best interest.

Thus, we find no abuse of discretion in the trial court's refusal to appoint new counsel to prepare and present a new trial motion. With respect to appellant's concern about the adequacy of defense counsel's representation, the record contains no colorable claim that it was in fact deficient. On this record, appellant did not overcome the first hurdle of demonstrating that counsel did not have a sound tactical reason for not having him examined. Furthermore, appellant did not produce an evaluation that was favorable to him. Thus, even if the trial court had assumed for the sake of argument that counsel's performance was deficient, appellant did not show that a determination more favorable to him might have resulted in the absence of counsel's failings. In short, the trial court elicited and considered appellant's reasons for believing he had been ineffectively represented and properly concluded on this record that appellant had no claim. The trial court did not err in reaching this conclusion.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P.J

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Duffy, J.